LEGITIMACY AND SCOPE OF TRUST TERRITORY HIGH COURT POWER TO REVIEW DECISIONS OF FEDERATED STATES OF MICRONESIA SUPREME COURT: THE *OTOKICHY* CASES

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On August 13, 1982, in a case styled *Federated States of Micronesia v. Otokichy,*[1] the Supreme Court of the Federated States of Micronesia, Appellate Division,[2] rendered its historic first decision and issued its first appellate opinion. Writing for a unanimous Court,[3] Chief Justice Edward C. King[4] held that the Trial Division of the Supreme Court has jurisdic-

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[1] 1 FSM Intrm. 183 (1982).

[2] The F.S.M. Const. art. XI, § 2 establishes trial and appellate divisions of the Supreme Court; *see* note 3 *infra*. The August 13, 1982, decision in *Otokichy* was an appeal from a trial division ruling. *See* companion case, Truk v. Otokichy, 1 FSM Intrm. 127 (1982).

[3] The *Otokichy* Court consisted of Chief Justice King and designated justices Soukichi Fritz, Presiding Judge of the Truk District Court, and Janet H. Weeks, Judge of the Superior Court of Guam. The F.S.M. Const. art. XI, § 2 provides that the Supreme Court shall consist of the Chief Justice "and not more than 5 associate justices," that the trial division can be held by one justice, that the trial division justice may not sit on the appeal from his own decision, and that "at least 3 justices shall hear and decide appeals." Since the Supreme Court presently consists of Chief Justice King and Associate Justice Richard H. Benson, the appellate division, in any appeal from the trial division, will necessarily consist of King or Benson and at least two designated justices. The F.S.M. Const. art. XI, § 9(b) empowers the Chief Justice to "assign judges among the divisions of a court and give special assignments to retired Supreme Court justices and judges of state and other courts." The power to appoint and assign designated justices is further elaborated in Section 4 of the Judiciary Act of 1979, F.S.M. Code tit. 4, § 104 (1982).

The Supreme Court's second appellate decision, Alaphonso v. Federated States, 1 FSM Intrm. 209 (1982), was rendered by a panel consisting of Chief Justice King and designated justices Alfred Laureta, Judge of the U.S. District Court for the Northern Mariana Islands, and Herbert Soll, Judge of the Commonwealth Court of the Northern Mariana Islands.

[4] Chief Justice King became the first Chief Justice of the Federated States of Micronesia on March 24, 1981. King's background appears in Turcott, *Beginnings of the Federated States of Micronesia Supreme Court* (unpublished manuscript to be published at 5 U. HAWAII L. REV. _____ (1983)).

tion over criminal cases even where the offenses are alleged to have been committed before the effective date of the Federated States of Micronesia National Criminal Code[5] and are thus reachable only under the otherwise repealed criminal law of the Pacific Islands Trust Territory.[6] King's holding was based entirely upon interpretations of the Federated States of Micronesia Constitution[7] and the new National Criminal Code.

On March 11, 1983, the *Otokichy* decision was reversed[8] by the Pacific Islands Trust Territory High Court in the exercise of *certiorari* jurisdiction bestowed upon the High Court by order[9] of the United States Secretary of the Interior. The High Court's opinion, authored by Associate Justice Richard I. Miyamoto,[10] flatly disagreed with the Federated States of Micronesia Supreme Court's construction of the National Criminal Code, and held that jurisdiction in *Otokichy* and like cases is vested in the Trial Division[11] of the Trust Territory High Court. This article will examine the *Otokichy* opinions and will assess the nature and legitimacy of the High Court's assertion of power to review Supreme Court decisions treating strictly internal law matters.

The article commences with a description of the development of constitutional government in the Federated States of Micronesia that culminated in the exercise of constitutional jurisdiction by the Federated States Supreme Court. Governance by the United States in its role as administering authority of the Pacific Islands Trust Territory is, by way of contrast, depicted as an expiring function. In particular, the mission of the Trust Territory High Court in dispute resolution is virtually completed. The High Court retains *certiorari* jurisdiction to review final decisions of the Supreme Court, but the nature and scope of that review power have not been delimited. Surprisingly, the High Court, in its first exercise of that jurisdiction in *Otokichy,* failed to raise or to consider the issue. This article concludes that the High Court's legitimate power in its twilight years in Micronesia does not extend to cases like *Otokichy,* and

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[5] F.S.M. Code tit. 11 (1982); *see infra* text accompanying note 99.

[6] *See* 1 TTC tit. 11 (1980); *infra* note 90.

[7] The F.S.M. Constitution is reprinted in 1 F.S.M. Code at C-3-C-18 (1982) and 2 TTC 309 (1980 Ed.).

[8] Otokichy v. Appellate Division, Cert. No. C-2-82, slip op., (T.T.C. App. Div. Mar. 11, 1983).

[9] U.S. Department of Interior Secretarial Order No. 3039 (1979), *reprinted in* 1 TTC 47 (1980 Ed.); *see infra* text accompanying notes 112 & 113.

[10] The High Court panel consisted of Chief Justice Alex R. Munson, Associate Justice Miyamoto, and designated justice Alfred Laureta, Judge of the U.S. District Court for the Northern Mariana Islands.

[11] The High Court has trial and appellate division. *See* 1 TTC § 52 (1980 Ed.). Pending the establishment of functioning court systems in the states of Kosrae, Ponape and Truk, the trial and appellate divisions of the High Court function in the interim as surrogate state courts, *see infra* text accompanying notes 77-84. Jurisdiction in cases like *Otokichy,* held the High Court's appellate division, lies in the High Court's trial division in its state court surrogate role.

that *Otokichy*-like arrogations of appellate authority by the High Court should be disapproved and rescinded by the Interior Secretary because they place the United States in violation of the very Trusteeship Agreement that defines its legitimate Pacific Islands presence.

The Federated States of Micronesia. The Federated States of Micronesia, one of several emergent Pacific political entities,[12] is a nation of 607 islands covering a huge expanse of ocean north of the equator and west of the international dateline.[13] The Federated States includes most of the Caroline Islands.[14] What were formerly the island districts of Ponape, Truk and Yap are now the four Federated States of Kosrae,[15] Ponape,[16] Truk[17] and Yap.[18] The Federated States' 607 islands comprise a land area of 270 square miles and support a population of 77,000.[19]

For the past hundred years the people of the Caroline Islands have been dependent upon four successive foreign powers: Spain (1885-98),

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[12] The Compact of Free Association, *see infra* note 28, has been signed by the governments of the United States, the Marshall Islands, the Republic of Belau and the Federated States. The constitutions of the latter three governments are reprinted in 2 TTC (1980 Ed.). The free-association status and the proposed arrangement with the Commonwealth of the Northern Mariana Islands are discussed in Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980).

[13] For current statistical information about the Federated States, see F.S.M. NATIONAL GOVERNMENT, [1981] NATIONAL YEARBOOK OF STATISTICS [hereinafter cited as 1981 STATISTICS]. The Federated States lies between 1° and 12° north latitude, and between 137° and 163° east longitude.

[14] Micronesia consists of four archipelagoes: the Mariana, Caroline, Marshall and Gilbert Islands. The Carolines comprise the islands of Ponape, Truk, Yap and Palau, in east-to-west order. The Palau Islands have become the Republic of Belau, *see supra* note 12; the balance of the Carolines is now the Federated States of Micronesia.

[15] Kosrae, consisting of five islands with a total land area of 42.3 square miles and a population of 5,522, was formerly part of the Ponape District. *See* 1981 STATISTICS, *supra* note 13, at 4.

[16] Ponape consists of 163 islands with a land area of 133.4 square miles and a population of 23,485. *Id.* The principal island, also called Ponape, is one of the largest islands in Micronesia with an area of 129 square miles. The seat of the Government of the Federated States is in Kolonia, Ponape. For a wealth of statistical data about Ponape, see PONAPE STATE STATISTICS OFFICE, PONAPE STATISTICAL YEARBOOK FOR 1981.

[17] Truk has 290 islands, a land area of 49.2 square miles, and a population of 38,648. Truk thus claims over half the population of the Federated States. *See* 1981 STATISTICS, *supra* note 13, at 4.

[18] Yap boasts 149 islands, a land area of 45.9 square miles, and a population of 9,319. *See* 1981 STATISTICS, *supra* note 13, at 5. Yap has adopted a state constitution. *See infra* text accompanying notes 56 & 82.

[19] *See* 1981 STATISTICS, *supra* note 13, at 5. Of these, about 12,000 are employed as wage and salary earners, and over half of these are employed by the government. *See* 1981 STATISTICS, *supra* note 13, at 10-11. Subsistence agriculture and fishing are common. For a sociocultural description of the people of the Federated States, see W. ALKIRE, AN INTRODUCTION TO THE PEOPLES AND CULTURES OF MICRONESIA 1-18, 33-67 (1977).

Germany (1899-1914), Japan (1914-45) and America (since 1945).[20] Spain obtained the Carolines through papal arbitration, Germany purchased them from Spain, Japan colonized and governed them under a League of Nations mandate, and the United States seized them in World War II.[21] Throughout that century the Carolinians have preserved their languages,[22] maintained their distinctive customs and traditions,[23] and sustained a hope for freedom and autonomy.[24] At the present time the Federated States is part of the Trust Territory of the Pacific Islands, and the people are wards of the United States under a Trusteeship Agreement approved by the United Nations Security Council and the United States in 1947.[25]

The Trusteeship Agreement designates the United States as "administering authority" of the Trust Territory with "full powers of administration, legislation, and jurisdiction over the territory."[26] This mandate is subject to one important condition:

> In discharging its obligations [as a trustee] the administering authority shall . . . foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop

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[20] For a description of this history, see C. HEINE, MICRONESIA AT THE CROSSROADS (1974); N. MELLER, THE CONGRESS OF MICRONESIA (1969).

[21] The United States' acquisition of Micronesia included the Carolines, the Marshalls, and the Marianas. Meller writes:

> Over 6,000 Americans were killed wresting Micronesia from Japanese control, and the temper of the American people hardly countenanced surrendering the islands to any other nation; conversely, the United States had early declared it sought no territorial gains from World War II. The placing of the area under United Nations trusteeship resolved the dilemma, and in 1947, with the Trusteeship Agreement, the islands technically came under civil administration.

N. MELLER, *supra* note 20, at 14. Governance of the Trust Territory was entrusted to the Commander-in-Chief, U.S. Pacific Fleet, from 1947 until 1951, when the responsibility was shifted to the Department of the Interior. *Id.* at 14-17.

[22] Each of the four Federated States has a separate language, and there are many dialects. Most people speak their own language plus English or Japanese. It is probable that English will become the common language of the Federated States. *See* C. HEINE, *supra* note 20, at 92. English is the language of the Government of the Federated States. *See* 1981 STATISTICS, *supra* note 13.

[23] W. ALKIRE, *supra* note 19.

[24] C. HEINE, *supra* note 20.

[25] Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947), *reprinted in* 2 F.S.M. Code 895 (1982), *and in* C. HEINE, *supra* note 20, at 188.

[26] *Id.* art. 3. The agreement refers to the U.N. CHARTER, arts. 75-77 (establishing and defining an "International Trusteeship System"), *reprinted in* 2 F.S.M. Code 890 (1982).

> their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends. . . .[27]

In pursuance of this obligation the United States has countenanced a developmental process, more fully described in the next section of this article, resulting in the emergence of the Federated States of Micronesia.

On October 1, 1982, at Honolulu, Hawaii, the governments of the United States and the Federated States signed the Compact of Free Association.[28] Subject to termination by either party,[29] the Compact envisions the Federated States as dependent upon the United States for its security and defense[30] and for continuing economic assistance.[31] With those qualifications, the Federated States looks forward to independence. In particular, the free-association status contemplates unqualified autonomy for the Federated States in self-government and internal law.[32] The Compact of Free Association was approved by plebiscite in the Federated States on June 21, 1983, and now awaits approval by the United States Congress and by the United Nations.[33]

Development of Self-Government in the Federated States. The United States in 1964 sponsored a Congress of Micronesia to inaugurate the de-

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[27] Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 25, art. 6. Article 6 also requires that the United States promote "economic advancement and self-sufficiency" and social and educational advancement. The language quoted in text conforms with the requirement of article 76 of the U.N. CHARTER.

[28] The Compact of Free Association, as officially approved in 1982, closely resembles the draft initialed in 1980 which was reprinted in 7 BROOKLYN J. INT'L L. 283 (1981), and discussed in Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law, id.* at 235. Macdonald states that the concept of free association implies: "(1) self-government—the associated territory should have a right to determine its internal constitution; (2) free expression—the decision should be one freely made without compulsion; and (3) mutability—the territory should retain the power and right to become independent should it later desire to do so." *Id.* at 241; *see also* Clark, *supra* note 12. Clark concludes that the envisioned free-association status comports with applicable self-determination requirements. *Id.* at 74.

[29] Compact of Free Association §§ 441-43, 451-53 (1982).

[30] *Id.* tit. 3. In other respects the Federated States is free to conduct its own foreign affairs except that it "shall consult, in the conduct of [its] foreign affairs, with the Government of the United States." *Id.* §§ 121, 123.

[31] *Id.* tit. 2.

[32] *Id.* § 111: "The peoples of Palau, the Marshall Islands and the Federated States of Micronesia, acting through the Governments established under their respective Constitutions, are self-governing."

[33] The plebiscite result was reported in The National Union (official F.S.M. publication), Aug. 19, 1983, at 1, col. 1. Thereafter the Compact becomes effective upon approval "by the Government of the United States in accordance with its constitutional processes." Compact of Free Association § 411(e). Final approval of the Compact by the United Nations is contemplated in U.N. CHARTER arts. 83, 85.

velopment of self-government.[34] The Congress of Micronesia in turn authorized a constitutional convention which convened on Saipan in 1975 and wrote a constitution establishing a tripartite form of democratic government closely resembling its apparent American prototype.[35] By plebiscite held on July 12, 1978, the people of Kosrae, Ponape, Truk and Yap adopted and ratified that constitution by majority vote,[36] and then and there created the Federated States of Micronesia. Since then the development of constitutional government has proceeded without interruption.

The first Congress of the Federated States was elected on March 27, 1979, and it convened on May 10, 1979.[37] The Legislative Article of the Constitution establishes a unicameral Congress with expressly delegated legislative power, treaty ratification power, taxation power, impeachment and removal power, and power to override a presidential veto.[38] The national legislative power includes defining and establishing penalties for "major crimes."[39] All bills must pass two readings to become law. On first reading a two-thirds majority is required. "On final reading each state delegation shall cast one vote and a ⅔ vote of all the delegations is required."[40] Professor Meller notes that this scheme incorporates, in a unicameral legislature apportioned according to population, most of the power balancing that is typically achieved in a bicameral body wherein

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[34] *See* N. MELLER, *supra* note 20.

[35] *See* F.S.M. Const. art. IX (Legislative), X (Executive), and XI (Judicial). According to article II, the Constitution "is the supreme law of the Federated States of Micronesia." Article IV contains a "Declaration of Rights" that closely resembles the Bill of Rights. Article VII preserves national, state, and local levels of government, and article VIII ("Powers of Government") grants to the national government those powers "expressly delegated" or "indisputably national [in] character" but reserves to the states all other power. *See generally* Meller, *We the People*, THE NEW PACIFIC, Nov.-Dec. 1981, at 30.

In Alaphonso v. Federated States, 1 FSM Intrm. 209, 214, 216 (App. Div. 1982), the Court noted "that the Constitution and Journal of the [F.S.M.] Constitutional Convention reveal the United States Constitution as the historical precedent for most provisions in the Declaration of Rights," and looked to corresponding U.S. Supreme Court precedent "rendered prior to and at the times of the Constitutional Convention, and ratification of the Constitution . . . ." *See also* Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982) (judicial power granted to Supreme Court by F.S.M. Const. art. XI similar to that granted federal courts by U.S. Const. art. III).

[36] *See* Alaphonso v. Federated States, 1 FSM Intrm. at 216 n.5. Pursuant to article XVI ("Effective Date"), the Constitution took effect one year after ratification. According to 1 F.S.M. Code intro. (1982), the "establishment of constitutional government [took place] on May 10, 1979."

[37] Lonno v. Trust Territory, 1 FSM Intrm. 53, 56 n.5 (Trial Div. 1982). The seat of the national government is Kolonia in Ponape.

[38] F.S.M. Const. art. IX, § 2.

[39] F.S.M. Const. art. IX, § 2(p) ("to define major crimes and prescribe penalties, having due regard for local custom and tradition"). Congress exercised this power when it enacted the National Criminal Code, F.S.M. Code tit. 11 (1982), in 1981. Section 902 of the Code defines "major crimes" as those punishable by three years or more imprisonment and those "resulting in loss or theft of property or services in the value of $1,000 or more . . . ."

[40] F.S.M. Const. art. IX, § 20.

one house is constituted to provide equal representation to each state regardless of population.[41]

Congress consists "of one member elected at large from each state on the basis of state equality, and additional members elected from congressional districts in each state apportioned by population."[42] The former serve four-year terms, the latter two-year terms. Pursuant to the Executive Article of the Constitution, the President and Vice-President are elected "by Congress for a term of four years by a majority vote of all members."[43] Only those members of Congress holding four-year terms are eligible to become President and Vice-President. This scheme, notes Meller, was designed in recognition of the absence of "territory-wide political parties to support the campaigns of candidates," and to counterbalance the voting strength of Truk State.[44] It seems ideally suited to a nation as far-flung and locally isolated as the Federated States. In 1979, after the convening of the first Congress, President Tosiwo Nakayama and Vice-President Petrus Tun were elected by and from its membership.[45]

The Judicial Article of the Federated States of Micronesia Constitution vests "the judicial power of the national government" in the Supreme Court,[46] which has a trial division and an appellate division.[47] The Supreme Court is thus the Micronesian functional equivalent of the entire federal judiciary in the United States. As in the United States, the justices are appointed by the President, confirmed by the Congress, and serve "during good behavior."[48] On March 24, 1981, President Nakayama

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[41] Meller, *supra* note 35, at 31.

[42] F.S.M. Const. art. IX, § 8.

[43] F.S.M. Const. art. X, § 1. The President "may not serve for more than 2 consecutive terms." *Id.*

[44] Meller, *supra* note 35, at 30. Meller adds: "The solution [the Constitutional Convention] arrived at was to have each state elect one congressman for a four year term, and the FSM Congress then to co-opt the president and vice-president among them. This encouraged the popular choice of only persons of presidential timber to fill the longer-term congressional seats." *Id.* Following election, the president and vice-president "vacate their places in the legislative branch and thereafter function much as any other American-type executive." *Id.* For Truk State population statistics, see *supra* note 17.

[45] The Federated States of Micronesia Information Service reports, as this article goes to press, that the Third Federated States of Micronesia Congress has just reelected Tosiwo Nakayama President of the Federated States of Micronesia. President Nakayama, a native of Ulul Island, Truk State, previously served as senate president of the Congress of Micronesia and as president of the 1975 Constitutional Convention. The new vice-president of the Federated States is Bailey Olter, who hails from Mokil Island in Ponape State. Honolulu Star-Bulletin, May 11, 1983, at A-11, col. 4.

[46] Like U.S. Const. art. III, § 1, F.S.M. Const. art. XI, § 1 contemplates "a Supreme Court and inferior courts established by statute." But since the Federated States Supreme Court has a trial division and an appellate division, *id.* § 2, *see supra* note 3, there is no existing need for more national courts.

[47] *See supra* note 46.

[48] F.S.M. Const. art. XI, § 3.

administered oaths of office to Chief Justice Edward C. King and Associate Justice Richard H. Benson.[49] Chief Justice King sits as trial division justice in Ponape and Kosrae, and Justice Benson similarly functions at the trial level in Truk and Yap. On any appeal the trial justice is disqualified, and two additional justices are temporarily appointed to form an appellate panel of three to decide that case.[50] The Supreme Court's jurisdiction resembles that conferred upon federal courts in the United States, including "original jurisdiction in cases arising under this [Federated States of Micronesia] Constitution; national law or treaties . . . ."[51] The Supreme Court has the ultimate authority to interpret the Constitution,[52] and the Constitution is the "supreme law" of the nation.[53]

Like the United States, the Federated States is a federation with national and state levels of government. The Federated States Constitution requires that each state "shall have a democratic constitution."[54] The National Government is a government of power "expressly delegated [or] . . . indisputably national [in] character."[55] And, as in the United States, the states hold the residual power.[56] As of this writing only Yap has developed and adopted a state constitution, but constitutional conventions are underway or completed in Kosrae, Ponape and Truk.

The Constitution contains a Transition Article that "continues in effect" all Trust Territory statutes "except to the extent [they are] inconsistent with this Constitution [or are] amended or repealed."[57] In a recent trial-level decision in a seaman's suit against the Trust Territory Government styled *Lonno v. Trust Territory*,[58] Chief Justice King foreshadowed

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[49] Turcott, *supra* note 4. For a survey of the early history of the Federated States Supreme Court, see *id.*

[50] *See supra* note 3.

[51] F.S.M. Const. art. XI, § 6:

(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue.

(b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

(c) When jurisdiction is concurrent, the proper court may be prescribed by statute.

[52] *Id.* §§ 6-8; Alaphonso v. Federated States, 1 FSM Intrm. 209 (App. Div. 1982).

[53] F.S.M. Const. art. II states: "This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict."

[54] *Id.* art. VII, § 2.

[55] *Id.* art. VIII, § 1.

[56] *Id.* § 2: "A power not expressly delegated to the national government or prohibited to the states is a state power."

[57] *Id.* art. XV, § 1.

[58] 1 FSM Intrm. 53 (Trial Div. 1982).

the decision in *Otokichy* by holding that the Seaman's Protection Act,[59] although enacted as a part of the Trust Territory Code by the Congress of Micronesia,[60] "relates to matters that now fall within the legislative powers of the [Federated States] national goverment . . . and has therefore become a national law of the Federated States of Micronesia"[61] by operation of the Transition Article. Thus, held King, Lonno's suit fell within Supreme Court jurisdiction because it "arose under" national law.[62] The result is that national law assimilates those parts of the Trust Territory Code that treat subject matter within the constitutional reach of the Congress of the Federated States.[63]

The Federated States, after a century of alien dominion and governance, has quickly seized the opportunity for self-government extended by America pursuant to its obligation as international trustee. The Constitution, which was ratified in 1978, became effective by its own terms in 1979,[64] and by 1981 all three branches of the national government were fully functional. The Compact of Free Association has been signed and awaits final approval. America's trusteeship responsibilities are approaching expiration.[65]

Transitional Trust Territory Administration. Pursuant to Executive Order No. 11021,[66] dated May 9, 1962, the Secretary of the Interior is charged with responsibility "to carry out the obligations assumed by the United States as the administering authority of the trust territory under the terms of the trusteeship agreement . . . ."[67] The charge includes the power to administer civil government, to exercise executive, legislative and judicial functions, and to designate and appoint personnel for these purposes.[68] The Trust Territory High Court is the creature of this executive authority.[69] Established by order of the Interior Secretary to carry out a centralized judicial function in Micronesia, the High Court has trial

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[59] 1 TTC §§ 201-32 (1980 Ed.).

[60] Lonno v. Trust Territory, 1 FSM Intrm. at 72.

[61] *Id.; see infra* note 104.

[62] *See supra* text accompanying note 51. Alternatively, held King in *Lonno*, the case fell within the Supreme Court's original and exclusive admiralty jurisdiction conferred by F.S.M. Const. art. XI, § 6(a). *See supra* note 51.

[63] The F.S.M. Code (1982) is a good example of the proposition in text. It contains, in 57 titles, those statutes enacted by the F.S.M. Congress plus those portions of the Trust Territory Code not "exclusively within the jurisdiction of the States of the Federated States of Micronesia." F.S.M. Code intro. at i (1982). By the same reasoning, state law would assimilate the non-inconsistent balance of the Trust Territory Code.

[64] *See supra* note 36.

[65] *See supra* note 33. Termination of the trust is discussed in Clark, *supra* note 12.

[66] *Reprinted in* 48 U.S.C. § 1681 (1976).

[67] Exec. Order No. 11,021. *Id.* § 1.

[68] *Id.* §§ 1-2.

[69] 1 TTC §§ 51-55 (1980 Ed.); Secretarial Order No. 2918 (as amended March 24, 1976), part IV (judicial authority), *reprinted in* 1 TTC 23, 29 (1980 Ed.).

and appellate divisions and territory-wide jurisdiction over "all causes, civil and criminal."[70] High Court justices are appointed by and serve at the pleasure of the Interior Secretary.[71] The Appellate Division of the High Court is located at Saipan in the Northern Mariana Islands.

With commendable foresight, the Secretary of the Interior anticipated the need to provide for delegation and transfer of governmental functions during the period of transition to self-government and cessation of official American presence in Micronesia.[72] The Secretary in 1979 promulgated Secretarial Order No. 3039 "to provide the maximum permissible amount of self-government, consistent with the responsibilities of the Secretary under Executive Order 11021, for the Federated States of Micronesia, the Marshall Islands, and Palau, pursuant to their respective constitutions as and when framed, adopted, and ratified, pending termination of the 1947 Trusteeship Agreement . . . ."[73] Section 2 of Secretarial Order No. 3039 expressly delegates "executive, legislative, and judicial functions of the Government of the Trust Territory of the Pacific Islands . . . to the three political subdivisions of the Trust Territory known as the Federated States of Micronesia, the Marshall Islands and Palau."[74] This delegation, which became effective upon the commencement of "constitutional government,"[75] enables the courts of the Federated States to assume jurisdiction "as the Constitution of the Federated States of Micronesia authorizes such jurisdiction."[76]

Section 5 of Secretarial Order No. 3039 provides that the Trust Territory judiciary, which includes Community and District Courts and the trial and appellate divisions of the Trust Territory High Court, will continue to function "until the Federated States of Micronesia, the Marshall Islands, and Palau have established functioning Courts pursuant to the

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[70] 1 TTC § 53 (1980 Ed.).

[71] *Id.* § 1(2). The Interior Secretary may also "make temporary appointments when a vacancy exists, and in addition may appoint temporary judges to serve on the high court." *Id.* In *In re* Iriarte, 1 FSM Intrm. 255, 267 (Trial Div. 1983), the court notes that High Court personnel are selected and appointed without prior consultation with the Federated States.

[72] In 1978 the Secretary promulgated Secretarial Order No. 3027, *reprinted in* 1 TTC 44 (1980 Ed.), in recognition of the emerging Federated States, Marshall Islands and Palau governments. Order 3027 canceled the Congress of Micronesia and reorganized the Trust Territory Government "to give appropiate effect to governments based on locally developed constitutions in the Marshall Islands, the Palau District, and the Districts which will comprise the Federated States of Micronesia."

[73] Secretarial Order No. 3039 § 1, *reprinted in* 2 F.S.M. Code 950 (1982).

[74] *Id.* § 2. This express delegation is recognized by the High Court in Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. (T.T.C. App. Div. Mar. 11, 1983), and discussed by the Supreme Court in Lonno v. Trust Territory, 1 FSM Intrm. at 57-59.

[75] Secretarial Order No. 3039, *supra* note 73, § 7. Constitutional government commenced in 1979, *see supra* note 36, and the executive and legislative delegations occurred in that year, *see supra* text accompanying notes 37 and 44. Transfer of the judicial function to the Supreme Court took place in 1981, *see infra* text accompanying notes 79 & 80.

[76] Lonno v. Trust Territory, 1 FSM Intrm. at 58.

terms of their respective constitutions."[77] The determination that "functioning courts" exist is to be made by the Chief Justice of the High Court,[78] and the Federated States Supreme Court was so certified on May 5, 1981.[79] The Supreme Court has held that Section 2 delegation of jurisdiction and judicial functions to the Supreme Court became fully effective on that date.[80] Like its United States counterpart, however, the Supreme Court is a court of limited juisdiction;[81] it received on May 5, 1981, only that portion of the judicial function which it is constitutionally entitled and bound to exercise. The balance belongs to the state courts in the four Federated States. At this writing, however, only Yap State has established a functioning state court system.[82]

In the absence of functioning court systems in the states of Kosrae, Ponape and Truk,[83] the trial and appellate court structure of the Trust Territory Government, including trial and appellate divisions of the High Court, continues in those states to exercise whatever jurisdiction "does not fall within the constitutional jurisdiction of the Supreme Court of the Federated States of Micronesia."[84] In other words, the High Court serves in Kosrae, Ponape and Truk as interim surrogate for the as-yet-unestablished state court systems. The Court pointed out in *Lonno v. Trust Territory* that the allocation of jurisdiction between the Supreme Court and the High Court during this transitional period "will be determined on the

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[77] Secretarial Order No. 3039, *supra* note 73, § 5a.

[78] *Id.* "The determination that such functioning courts exist shall be made in writing by the Chief Justice of the High Court of the Trust Territory of the Pacific Islands upon written request of the chief judicial officer of the respective jurisdictions. A denial of the request may be appealed to the Secretary."

The F.S.M. Judiciary Act of 1979, F.S.M. Code tit. 4 (1982), provides in § 206 ("initial organization of Supreme Court") that the "Supreme Court is deemed organized when . . . the Chief Justice of the Trust Territory High Court, upon written request by the Chief Justice of the Supreme Court of the Federated States of Micronesia certifies . . . that the Supreme Court is prepared to hear matters."

[79] *See* Federated States v. Otokichy, 1 FSM Intrm. 183, 193 n.8 (App. Div. 1982); Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 2 n.3 (T.T.C. App. Div. Mar. 11, 1983).

[80] Lonno v. Trust Territory, 1 FSM Intrm. at 58. This result is implicit in the transfer and delegation provisions of Secretarial Order No. 3039, *supra* note 73, § 7: "This Order becomes effective, as to each of them, upon the date when each of the respective jurisdictions, namely, the Federated States of Micronesia, the Marshall Islands, and Palau, have commenced a constitutional government . . . ." Constitutional government in the Federated States commenced in 1979, see *supra* notes 75 and 36, and thus delegation of the judicial function merely awaited the certification of the Supreme Court.

[81] *See supra* note 51.

[82] The Yap State court system was certified pursuant to Secretarial Order No. 3039 by the Trust Territory Chief Justice on March 9, 1982. *See* Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 9, (T.T.C. App. Div. Mar. 3, 1983).

[83] Truk State has held a constitutional convention, and conventions are underway or completed in Kosrae and Ponape. *See* Turcott, *supra* note 4. State court systems will likely be established in the near future in all three states.

[84] Lonno v. Trust Territory, 1 FSM Intrm. at 68.

basis of jurisdictional provisions within the Constitution and laws of the Federated States of Micronesia and its respective states."[85] Thus, the Trust Territory courts "continue to function"[86] in the Federated States to fill a void, as the High Court recognized in its opinion in *Otokichy*.[87] The High Court noted that the absence of state courts in Truk, Ponape and Kosrae creates a "void [which] is filled by the continuing existence of the Trust Territory courts . . . within the FSM states where state courts have not been established."[88] This brings us directly to *Otokichy*, which raised a question of *trial-level* jurisdiction in a case filed in Truk. The precise question was whether the High Court's Trial Division, sitting as state court surrogate, or the Supreme Court's Trial Division, exercising its constitutionally mandated jurisdiction, should hear the case in the first instance.

The Merits of Otokichy. Otokichy arose out of serious criminal charges involving group torture and allegations of attempted murder, aggravated assault and conspiracy. The events occurred on Onei Island, Truk, on May 4, 1981. The State of Truk brought charges in the Trust Territory High Court[89] alleging violations of applicable provisions of the Trust Territory Code.[90] Prior to trial, the Federated States of Micronesia Government intervened by way of motion under Special Joint Rule No. 1, seeking transfer to the Federated States Supreme Court.

Special Joint Rule No. 1, signed on July 13, 1981, by the respective Chief Justices of the Trust Territory High Court and the Federated States Supreme Court, expresses as its purpose "that the Supreme Court

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[85] *Id.*

[86] The language is that of Secretarial Order No. 3039, *supra* note 73, § 5a.

[87] Cert. No. C-2-82, slip op. at 9 (T.T.C. App. Div. Mar. 11, 1983).

[88] *Id.* at 9-13. The High Court also asserted, in dicta, that it will "continue to exercise exclusive jurisdiction over suits against the Trust Territory of the Pacific Islands Government or the High Commissioner filed within FSM, Palau, and the Marshall Islands . . . ." *Id.* at 13. This assertion appears designed to express disapproval of the Supreme Court's holding in Lonno v. Trust Territory, 1 FSM Intrm. 53, which was to the contrary. The question of jurisdiction over suits brought against the Trust Territory Government turns on construction of the following language in Secretarial Order No. 3039, *supra* note 73, § 5a: "Once such a determination [that local functioning courts exist] has been made for a jurisdiction, all cases, except for suits against the Trust Territory of the Pacific Islands Government or the High Commissioner, currently pending but not in active trial before the Community Courts, the District Courts, and the Trial Division of the High Court, shall be transferred to the functioning courts of such jurisdiction." *Lonno* held that this language, plus the general delegation of functions provision of § 2, transferred the High Court's former exclusive jurisdiction over suits against the Trust Territory Government to the courts of the Federated States.

[89] There are two criminal cases, Nos. 13-81 and 16-81, and twelve defendants were charged with the same crimes.

[90] 1 TTC tit. 11, §§ 4(2) (attempted murder), 202 (aggravated assault), and 401 (conspiracy to commit murder and aggravated assault). The possible penalties were 30 months to 30 years imprisonment, 10 years imprisonment, and 5 years imprisonment, respectively.

of the Federated States of Micronesia immediately shall exercise the full scope of its jurisdiction under the Constitution and laws of the Federated States of Micronesia, and that the Supreme Court shall determine the scope of its own jurisdiction."[91] Recognizing that the "High Court shall remain active in the Federated States of Micronesia to hear only those cases which do not fall within the jurisdiction of the Supreme Court," the rule provides that in any case originally filed in the High Court either party may assert by motion that the case properly falls within the jurisdiction of the Supreme Court, and mandates that upon such a motion the High Court "shall promptly certify the question of jurisdiction to the Supreme Court . . . ."[92] Special Joint Rule No. 1 is thus an explicit recognition of the Supreme Court's primacy on questions of its own constitutional jurisdiction. The Trial Division of the High Court granted the Federated States' motion and transferred *Otokichy* to the Trial Division of the Supreme Court, which held that, because the crimes charged occurred before the effective date of the new National Criminal Code,[93] and since the charges were brought under the Trust Territory Code,[94] the Supreme Court did not have subject matter jurisdiction.[95] The Federated States appealed, and the stage was set. The outcome would hinge on determination of the question of national law.[96]

Chief Justice King's opinion for the Court in *Otokichy*, joined by designated justices Soukichi Fritz[97] and Janet H. Weeks,[98] squarely held that the case arose under national law and, accordingly, fell within Supreme Court trial jurisdiction. The analysis was straightforward and trenchant. The National Criminal Code was signed into law on January 7, 1981, but by its own terms did not become effective until July 12, 1981.[99] The criminal law governing the *Otokichy* crimes, which were perpetrated on May 4, 1981, was Trust Territory Code Title 11, whereunder the charges were brought. When the Federated States of Micronesia commenced constitutional government in 1979,[100] Title 11 became the criminal law of the Federated States by operation of the Constitution's transition provision

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[91] Special Joint Rule No. 1, High Court, Trust Territory of the Pacific Islands; Supreme Court, Federated States of Micronesia: *Joint Order for Transfer of Cases and Resolution of Jurisdictional Issues*, July 13, 1981 (unpublished admin. order). Special Joint Rule No. 1 is signed by Chief Justice King and by former High Court Chief Justice Harold M. Burnett.

[92] *Id.*

[93] The F.S.M. National Criminal Code, F.S.M. Code tit. 11 (1982), did not become effective until July 12, 1981.

[94] *See supra* note 90.

[95] The holding was spelled out in a companion case, Truk v. Otokichy, 1 FSM Intrm. 127 (Trial Div. 1982) (Benson, J.).

[96] F.S.M. Const. art. XI, § 6(b); *see supra* note 51.

[97] *See supra* note 3.

[98] *Id.*

[99] F.S.M. Code tit. 11, § 3 (1982).

[100] *See supra* notes 36 and 75.

"continu[ing] in effect" all applicable Trust Territory statutes.[101] The question was whether the Title 11 attempted murder and assault provisions were assimilated into *national* law or, more precisely, whether cases charging violations of those provisions now "arise under" national law and therefore fall within Supreme Court jurisdiction. A negative answer to the question would mean that the *Otokichy* offenses would be within the residual jurisdiction of state courts and therefore proper in the first instance in the trial division of the High Court. Since Congress has the power to define and prescribe punishments for "major crimes,"[102] and since the National Criminal Code embodied that power and defined "major crimes" as those punishable by three years or more imprisonment,[103] the offenses alleged in *Otokichy* would qualify as "major crimes" were they so assimilated. Assimilation so conceived, however, presents a sort of chicken-and-egg problem. The offenses become "major crimes" if assimilated, but can't be assimilated unless they are "major crimes."[104] Perhaps in recognition of this difficulty, the Supreme Court turned to the repealer provisions of the National Criminal Code.

Section two of the National Criminal Code repeals "to the full extent of National Government jurisdiction"[105] Title 11 of the Trust Territory Code. However, in order to avoid a hiatus of inadvertently immunized criminality, on one hand, and an *ex post facto* problem, on the other, Section 102 of the Code provides that it "does not apply to offenses committed before its effective date" and that prosecutions for such offenses

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[101] F.S.M. Const. art. XV, § 1; *see supra* text accompanying notes 57-63.

[102] F.S.M. Const. art. IX, § 2(p); *see supra* text accompanying note 39. Congress's power to define and thus "nationalize" major crimes presents a sharp contrast with the United States Congress's crime legislating power which, with a few specified exceptions such as counterfeiting, piracy and other offenses on the high seas (see U.S. Const. art. 1, § 8) is entirely derivative from other powers like commerce regulation and taxation. *See generally* W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 106, 112 (1972).

What are "major crimes"? The constitutional history is limited:

> Your Committee feels that a rational clear-cut distinction between the authority of the national government and that of the state governments ought to be made in the area of criminal law and that the distinction ought to be based on the severity of the crime. Your Committee also feels that the national government ought to take local custom into consideration in legislating regarding crimes. Your Committee has therefore provided that the national government should have authority over major crimes, should be empowered to distinguish between "major" and "minor" crimes and that in enacting such legislation should take local custom into account.

2 *J. Micro Con Con of 1975*, S.C. REP. No. 33 ¶ 18, at 813, 819, Oct. 10, 1975.

[103] National Criminal Code, F.S.M. Code tit. 11, § 902(a) (1982). Section 902(b) added to the "major crimes" category "all crimes resulting in loss or theft of property or services in the value of $1,000 or more, as well as any attempt to commit such crimes."

[104] The subject matter of Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982), was admiralty and therefore came within Congress's power "to regulate navigation and shipping." *See* F.S.M. Const. art. IX, § 2(h); text *supra* accompanying notes 57-62. Assimilation of the Seaman's Protection Act into national law was therefore direct and uncomplicated, in contrast with a classification of "major crimes" awaiting definition by Congress.

[105] National Criminal Code, F.S.M. Code tit. 11, § 2 (1982).

"are governed by the prior law, which is continued in effect for that purpose, as if the Code were not in force."[106] *Otokichy*, involving crimes allegedly committed on May 4, 1981, was such a prosecution. But for Section 102, reasoned King, the repealer clause of the Code would have barred the *Otokichy* prosecution.[107] Since Title 11 prosecutions are thus "preserved" by Section 102, they arise under national law. In support of this result King noted that, since Congress would have no power to authorize or affect prosecutions in courts outside the Federated States of Micronesia system, the "normal implication"[108] of Section 102's preservation of prosecutions for "major crime" category offenses is that Supreme Court jurisdiction attaches. In effect, Congress " 'froze' the [application of substantive criminal law to] defendants so that guilt or innocence would be determined under the law in effect at the time the alleged crime was committed."[109] Title 11 is thus "continued in effect" for cases like *Otokichy* only because of Section 102, and the Trust Territory criminal statutes owe whatever waning vitality they possess to the new National Criminal Code. Congress, King added, "recognized that this Court would have jurisdiction over all such cases by virtue of . . . the Constitution."[110] The *Otokichy* mandate instructed the Supreme Court Trial Division to retain jurisdiction of the prosecution.[111]

Otokichy in the High Court. The High Court's Appellate Division had final say in *Otokichy* because of its *certiorari* jurisdiction. Secretarial Order No. 3039,[112] in addition to providing a state court surrogate role for both divisions of the High Court, allows a continuing review function in the appellate division: "[T]he Appellate Division of the High Court shall retain jurisdiction by writ of certiorari to entertain appeals from the courts of last resort of the respective jurisdictions of the Federated States of Micronesia, the Marshall Islands and Palau."[113] In its first exercise of

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[106] *Id.* § 102. Retroactive extension of substantive provisions of the criminal code would in all likelihood have violated F.S.M. Const. art. IV, § 11 ("a bill of attainder or *ex post facto* law may not be passed"); *cf.* Weaver v. Graham, 450 U.S. 24 (1981); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[107] "The result would have been dictated by the Section 2 repeal clause," noted King, "but also could have occurred if the universal common law rule of abatement of prosecution under repealed statutes had been applied by the courts." Federated States v. Otokichy, 1 FSM Intrm. at 189-90. The rule of abatement is discussed in Bradley v. United States, 410 U.S. 605 (1973), which was cited by King for that proposition.

[108] 1 FSM Intrm. at 191.

[109] *Id.*

[110] *Id.* at 193.

[111] This instruction was in the form of a writ of prohibition addressed to the trial division and prohibiting transfer of the cases back to the High Court. "The Trial Division is instructed to retain jurisdiction and to proceed in the cases in whatever manner the Trial Division deems appropriate." *Id.* at 194.

[112] *Supra* note 73.

[113] *Id.* § 5b. The implication is that the *certiorari* jurisdiction will last until the trustee-

that function, the High Court reversed the Supreme Court and claimed subject matter jurisdiction for its own trial division in *Otokichy* "and cases of like import." The opinion by Justice Miyamoto is remarkable in two respects: it fails entirely to confront or dispute the analysis supporting the Supreme Court's holding that *Otokichy* "arises under" national law; and it neglects to raise or discuss the appropriate scope of the High Court's *certiorari* jurisdiction.

On the merits, Justice Miyamoto recognized that the judicial function in the Federated States is "shared between the national, state and local governments,"[114] and that the High Court serves as a surrogate "court within the FSM states where state courts have not been established."[115] He noted that the Trust Territory law was the applicable law, and characterized the Federated States' argument in support of the Supreme Court's exercise of jurisdiction as a contention "that the National Crimes Act in fact made the Trust Territory Title 11 crimes national crimes by the retroactive effect of the National Criminal Code."[116] So characterized, the contention was brushed aside as "convoluted" and "totally without merit."[117] Miyamoto simply quoted National Criminal Code Section 102,[118] the linchpin in the Supreme Court holding, and concluded: "Anything as clear as this section does not require interpretation by this court of matters advanced to support retroactivity."[119] In a curious afterthought, Miyamoto asserted that nothing in the new National Criminal Code "lessens the vitality of Title 11 of the Trust Territory Code, under the circumstances of this case."[120] That was the full extent of the High Court's treatment of the merits, except for the concluding generalization that the Supreme Court "cannot exercise jurisdiction over matters which are within the exclusive province of the state courts."[121]

What about Special Joint Rule No. 1 and the Supreme Court's right to determine its own jurisdiction? In response to the Federated States' argument that the Supreme Court's decision should be dispositive because of the rule, the High Court, with hyperbole characteristic of the entire opinion, dismissed the point as the product of a "gross misunderstanding as to what the Special Joint Rule is."[122] The rule, opined the High Court, "was simply a memorandum adopted to express general agreements to create

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ship is terminated.

[114] Otokichy v. Appellate Division, Cert. No. C-2-82, slip op. at 8 (T.T.C. App. Div. Mar. 11, 1983).

[115] *Id.* at 13.

[116] *Id.* at 11.

[117] *Id.*

[118] *See supra* text accompanying note 106.

[119] Cert. No. C-2-82, slip op. at 11 (T.T.C. App. Div. Mar. 11, 1983).

[120] *Id.*

[121] *Id.* at 12.

[122] *Id.* at 13.

an atmosphere for smooth transition and cooperation."[123] The "atmosphere" and language of *Otokichy* in the High Court are sarcastic and petulant, and the special rule is simply disregarded. The disregard of the rule is especially remarkable in view of the High Court's express recognition that its holding was based upon a rejection of the Supreme Court's definitive construction of Federated States national law, and that the jurisdictional bounty of *Otokichy* will accrue to the High Court strictly as state court surrogate.[124]

The thrust of the High Court decision, it seems fair to conclude, is that proper resolution of the subject matter jurisdiction issue thought to have been presented is so clear that the rejection of the Supreme Court's reasoning did not require discussion or analysis, and the joint rule could have no operative effect. Keeping in mind that the *Otokichy* litigants were Truk State and people from Truk, and that decision in both courts turned on construction of the Constitution and statutes of the Federated States, *Otokichy* appears to represent an arrogation of plenary appellate jurisdiction over national courts of last resort by the High Court in its holdover years in Micronesia.

Perhaps most suprising is the High Court's failure to address the legitimate scope of its own power under Secretarial Order No. 3039.[125] In addition to arguing Supreme Court primacy under the Federated States Constitution and Special Joint Rule No. 1, the Federated States asked the High Court to abstain from decision. Justice Miyamoto responded: "Surely, we cannot abdicate responsibility because the problem presented in this case is one of the prime reasons why the High Court was given certiorari jurisdiction."[126] But the "problem" and the "reason" thus implied were not specified or discussed. The implication is that the High Court harbors some unarticulated grievance against the Supreme Court, almost as if the opinion were designed to chastise by innuendo. The Supreme Court was reversed, "and the Trust Territory High Court . . . vested with the jurisdiction to try and dispose of this case and cases of like import."[127]

The Otokichy Analysis. One startling aspect of the High Court result in *Otokichy* is its apparent gratuitousness. It is difficult to imagine a subject matter of less concern or interest to the United States, the Trust Territory Government, or the High Court than the jurisdictional allocation of such a diminishing class of local litigants as that represented by *Otokichy*. Not only is the class of litigants diminishing; so is the function of the High Court's trial division. Soon Truk, Ponape and Kosrae will

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[123] *Id.*

[124] *See supra* text accompanying notes 83-88.

[125] *See supra* text accompanying notes 112-13.

[126] Cert. No. C-2-82, slip op. at 12 (T.T.C. App. Div. Mar. 11, 1983).

[127] *Id.* at 14.

have state court systems, and *Otokichy*'s progeny will be theirs. Why did the High Court care about internal jurisdictional allocation in the Federated States?[128] Why did the High Court choose to address the balance of national and state power? The High Court's opinion sheds no light on these problems.

The remainder of this analysis will focus on four issues: What about the merits of the jurisdiction issue in *Otokichy*? Did the High Court abuse its *certiorari* jurisdiction? Does the High Court result in *Otokichy* violate the Trusteeship Agreement? Should the Supreme Court follow *Otokichy* in subsequent cases?

What about the merits of *Otokichy*? Was the Supreme Court right? Did Congress intend the result King reached? On two points the intent of Congress was express: to define, and thus assert national jurisdiction over, "major crimes" as allowed in the Constitution;[129] and to repeal "to the full extent of National Government jurisdiction" the Trust Territory criminal code. Section 102's governance of interregnum prosecutions "as if the Code were not in force" suggests, literally and superficially, that the High Court should prevail in the jurisdictional tug-of-war. Had the National Criminal Code not been written, for example, it would have been impossible confidently to assert Supreme Court jurisdiction because, even though the Constitution's transition provision incorporated Title 11 into the law of the Federated States,[130] there would have been no definition of "major crimes" and hence no means of sorting out national cases and state cases.

The problem of sorting out national and state cases needs to be kept in mind to avoid the High Court's apparent mistake of viewing *Otokichy* as a clash between the Federated States criminal law and the Trust Territory Code. The Supreme Court employed the former, not to sap the vitality of the latter, but to demonstrate that the Trust Territory Code was assimilated into national, rather than state, law. There is no impediment to this result. It can be reached in several ways. To begin with, King's analysis is entirely adequate as a matter of statutory construction. Congress intended to define major crimes, and it intended to augment transfer of the judicial function to the Supreme Court.[131] Is it not plausible to infer from Congress's obvious intent a further desire to preempt major crime jurisdiction and deliver the maximum possible amount of it to the Supreme Court? Congress's predominant purpose, as King pointed out,

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[128] The opinion gives no indication of the High Court's interest.

[129] National Criminal Code, F.S.M. Code tit. 11, §§ 901-902 (1982). The Code was the embodiment of the Constitutional power. *See* F.S.M. Const. art. IX, § 2(p).

[130] Lonno v. Trust Territory, 1 FSM Intrm. 53 (Trial Div. 1982); *see supra* text accompanying notes 57-62.

[131] F.S.M. Code tit. 11, § 901 (1982), announces that "[t]he National Government of the Federated States of Micronesia has exclusive jurisdiction over all major crimes," and § 902 defines "major crimes." *See supra* note 39. The intent to facilitate transfer of the judicial function to the Supreme Court appears in S.C. REP. No. 1-299, 1st Cong., 4th Sess. (1981).

was substantive: it wanted to write a law defining serious crimes; it wanted to repeal the old law; and it wanted to avoid an interregnum of potential immunity. If Congress had thought about the issue at all, it would likely have wanted to deliver maximum jurisdiction to the Supreme Court, and that was the Supreme Court's holding. The High Court never suggested in *Otokichy* that Congress could not place jurisdiction over Trust Territory Code offenses in the Supreme Court. Indeed, the transition provision of the Constitution would have done precisely that except for the absence of a definition of "major crimes."[132] Thus the power existed and the question, as both courts recognized, was one of construction of national law.

The Supreme Court held that *Otokichy* arises under national law because the National Criminal Code preserves and classifies interim prosecutions for certain Trust Territory offenses already assimilated into the law of the Federated States. This is fully consistent with the meaning of "arising under . . . national law" intended by the Constitutional Convention. The relevant committee report[133] reads:

> In general, the national courts have trial court jurisdiction under this proposal in cases involving national law or the national constitution, and in certain other specific categories of cases, either interstate or international in character, and therefore beyond the competence of the state courts . . . . The term "arising under" . . . mean[s] cases involving the enforcement of a right protected or created by the national constitution, national law or a treaty and cases involving the construction or interpretation of the national constitution, national law or a treaty.[134]

The effect of the National Criminal Code in preserving interim prosecutions does not conflict with these stated purposes.

Another way of approaching the *Otokichy* issue is to ask what would have happened in a murder or attempted murder case had the National Criminal Code not been written. Because of the constitutional transition provision the relevant Trust Territory statute would have become a law of the Federated States, and because of Secretarial Order No. 3039 jurisdiction would lie in the Supreme Court or in a state court. High Court jurisdiction could thus be posited only in the High Court's role as Truk state court surrogate. Under the Constitution, and in the absence of any jurisdictional allocation by Congress, the Supreme Court would have jurisdiction over the case if it involved a "major crime" and thus became assimilated into national law.[135] Would not the Supreme Court, in such a case, have the power (if not the duty) to supply a common-law definition

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[132] *See supra* note 130.

[133] Committee on Governmental Functions, S.C. REP. No. 49, ¶ 7, 2 *J. Micro Con Con of 1975*, at 876, 879 (1976).

[134] *Id.*

[135] *See supra* text accompanying notes 129-30.

of "major crimes" in order to decide the jurisdictional issue?[136] And, in deciding upon the propriety of exercising such a power, would it not be relevant to know that Congress had decided, albeit in an enactment not yet effective, to draw the line between major and minor crimes at three years? In short, is it all that clear what would have happened "if the Code were not in force?" The High Court appears to have begged that question.

More important than deciding now which court had a firmer grip on *Otokichy*, however, is the question of the High Court's power. The Judicial Article of the Constitution vests the "judicial power of the national government . . . [in the] Supreme Court,"[137] and confers upon the Supreme Court the ultimate power to interpret the Constitution and all national law.[138] The High Court challenges that power, and disputes the Supreme Court's interpretation of the Constitution and a national statute. But under the Constitution the Supreme Court simply cannot be wrong in its interpretation of national law. The High Court's power cannot derive from the Constitution; its source must be elsewhere, and the only possibility is Secretarial Order No. 3039.[139]

Why was the High Court given the power of review on *certiorari*? Did the High Court abuse that power? The most troublesome aspect of *Otokichy* is that the High Court never addressed the issue of limitations on its own power. In 1982 the High Court adopted a set of rules to govern writs of *certiorari*,[140] but said only that the writ "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."[141] This rule was not mentioned by the High Court in *Otokichy*. Special Joint Rule No. 1, conceding the Supreme Court's primacy on *Otokichy*-like questions, was disregarded. After the High Court's decision, the Federated States asked for reconsideration and argued explicitly[142] the question of abuse of *certiorari* power, but the High Court denied the motion without opinion.[143] Virtually ines-

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[136] Such a duty could be derived from the Constitution's command that some crimes were too serious to entrust to state court adjudication. *See supra* note 102 and text accompanying notes 133-34.

[137] F.S.M. Const. art. XI, § 1.

[138] *Id.* §§ 6-8.

[139] *Reprinted in* 1 TTC 47 (1980 Ed.).

[140] High Court of the Trust Territory of the Pacific Islands, *Rules for Writ of Certiorari*, adopted and filed June 25, 1982.

[141] *Id.* Rule 5.

[142] Respondent's Motion for Reconsideration, Otokichy v. Appellate Division, Cert. No. C-2-82, (T.T.C. App. Div. Mar. 18, 1983). The Federated States argued: "It simply makes no sense at all to reason that the High Court has certiorari power largely in order to review matters of purely internal FSM law and the allocation of jurisdiction between the FSM's state and national courts. What possible need is there for a Trust Territory forum to resolve such issues? Why is the FSM forum not completely adequate and, in fact, more appropriate to the resolution of such internal issues?" *Id.* at 5.

[143] Otokichy v. Appellate Division, Cert. No. C-2-82 (T.T.C. App. Div. Mar. 23, 1983)

capable, in these circumstances, is the conclusion that the High Court, aware of the legitimate and pressing issue of its own power, prefers to stonewall its spectators.

The *certiorari* power should be limited to review of decisions that arguably threaten fulfillment of United States trusteeship responsibilities or endanger human rights. Secretarial Order No. 3039 can be construed as qualifying the grant of *certiorari* in this way. The purpose of the order, it will be recalled with some irony, is to provide the "maximum permissible amount of self-government" to the Federated States by releasing and transferring government functions. The transfer of executive functions is, however, expressly qualified to allow the High Commissioner the retained authority to carry out trusteeship obligations.[144] In the same way, the transfer of legislative functions is qualified to retain in the High Commissioner power to disapprove legislation "inconsistent with the provisions of this Order, the Trusteeship Agreement, with existing treaties, laws, and regulations of the United States . . . ."[145] The transfer of judicial functions is qualified only by the retention of the High Court's *certiorari* review, and the scope of that power is not delineated. Given the purpose and general thrust of Order No. 3039, however, plenary appellate review in the High Court seems the *least* likely answer to the question the High Court did not raise.

The most reasonable interpretation of the proper scope of *certiorari* review, in light of the maximum self-government motive, is that it is limited in the same way the order limits retained executive and legislative powers. The limitation allows the vestigial remnants of the Trust Territory Government no more power than that required to fulfill trusteeship responsibilities and to safeguard human rights. Indeed, proper discharge of the function of trustee demands the restraint implicit in the limitation. The High Court avoided the question and reversed *Otokichy* because it preferred its construction of Federated States law, and it expressly rested the decision on the *certiorari* jurisdiction conferred in the order. So defined, that jurisdiction violates the Trusteeship Agreement.

The Trusteeship Agreement not only requires the promotion of self-government but also dictates that self-government be a "progressively increasing" reality. In the Federated States, the High Court's presence is vestigial and its function is expiring. Its power must progressively diminish as the judicial power of the emergent Pacific nations matures. *Otokichy* is simply a step in the wrong direction. Special Joint Rule No. 1 should be reinstated. Its abrogation violates trusteeship obligations. And for the same reason, the High Court holding in *Otokichy* should be rescinded by the Interior Secretary. The High Court should not be permitted to stamp its preferences on the developing law of this young nation.

(order denying petition for reconsideration).

[144] Secretarial Order No. 3039, *supra* note 139, § 3a.

[145] *Id.* § 4a.

For the United States to pay lip service to self-government and free association, on one hand, and to countenance the bullying and demeaning of a constitutional government as the time for free association appears to draw near, on the other, is to perpetrate a double bind and to demonstrate its lingering ambivalence toward freedom and free association for Micronesia.[146] The diminishing class of litigants represented by *Otokichy* symbolizes the diminishing American presence in the Federated States of Micronesia. The High Court should be summarily instructed to respect an emerging Government and to curtail its *certiorari* function.

The final issue, whether the Supreme Court should respect and follow the High Court *Otokichy* precedent, was answered in the affirmative in an opinion delivered in August 1983. The Federated States Supreme Court, consisting of Associate Justice Benson and designated justices Dorothy W. Nelson[147] and Samuel P. King,[148] held in *Jonas v. Supreme Court*[149] that the High Court's authority to issue the *Otokichy* writ was legitimate, and that, "[T]his court cannot disregard an opinion resulting from such review."[150] So concludes the saga of *Otokichy*, but not the fundamental issue that it represents.

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[146] *See* Clark, *supra* note 12, at 6-7. "The United States has not shown great enthusiasm for the independence of Micronesia. The fear has been that United States security interests could not be adequately protected in an independent Micronesia."

[147] Judge, U.S. Court of Appeals for the Ninth Circuit.

[148] Judge, U.S. District Court for the District of Hawaii.

[149] 2 FSM Intrm. ___ (App. Div. Aug. 15, 1983) (per curiam).

[150] *Id.*, slip op. at 6.